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In The

Supreme Court of the United States

October Term, 1990

F. DALE ROBERTSON, Chief, United States Forest Service, THE UNITED STATES FOREST SERVICE, and MANUEL LUJAN, JR., Secretary of the Interior,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae Pacific Legal Foundation

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Pacific Legal Foundation (PLF) respectfully moves to file the annexed brief amicus curiae pursuant to Supreme Court Rule No. 37. Petitioner, the United States Forest Service, has given its consent to this amicus brief. Defendants-intervenors below have also given written consent to PLF's filing of an amicus brief. These letters of consent have been lodged with the clerk. However, respondents have denied consent.

IDENTITY AND INTERESTS OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees, the majority of whom are attorneys. PLF's Board considers the merits of any contemplated legal action and authorizes such legal action only when it is determined that the position to be advocated has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy concerns and litigation experience in the area of environmental regulation will provide an important additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court, including amicus participation in *Bowsher v. Synar*, 478 U.S. 714 (1986), where PLF argued in support of appellants challenging the Washington, D.C., District Court's mechanical application of the separation of powers doctrine. Recently, PLF filed an amicus brief in support of petitioners in *Gibson v. Florida State Bar*, No. 90-1102.

The issues posed in this case are of national significance. PLF believes that determining the proper role of the federal courts, insuring that legislative will is carried out, and protecting a balanced, rational approach to conservation are concerns and issues that reach far beyond the limited facts presented on this writ of certiorari. Amicus has considerable experience with environmental

regulations and attempts to limit judicial activism. Amicus' experience and understanding of these areas form a unique public interest perspective that is well-suited to provide the Court with additional argument. Amicus has concluded that because of the national significance of these issues, the present parties cannot adequately represent the interests of the broader public while at the same time representing their own particularized positions. Petitioners and respondents in their briefs below argued on the specific merits of the case and the specific statutory language involved. While these are necessary and important arguments, PLF believes that its perspective could aid the Court in considering the broader policy concerns behind the Northwest Timber Compromise and the importance of establishing a viable precedent to follow in the future.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief of amicus curiae be granted.

DATED: August 16, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

By Robin L. Rivett
ROBIN L. RIVETT

Attorneys for Amicus Curiae
Pacific Legal Foundation

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INTERESTS OF AMICUS

The identity and interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Seattle Audubon Society v. Robertson*, (*Robertson*) 914 F.2d 1311 (9th Cir. 1990).

INTRODUCTION

The conflict between the northern spotted owl and the continued vitality of the logging industry is at the heart of this case. The furor over timber production and protection of the spotted owl, a threatened species under the Endangered Species Act, has been very public and very emotional. The Ninth Circuit has been called upon to adjudicate numerous issues involving the owl and other endangered or threatened species. The resultant decisions seem to have consistently favored increased species protection while allowing the Pacific Northwest timber economy to sink like a torpedoed World War II tanker[1]. In order to correct the court's unilateral decisions and return some sense of economic stability to the rural communities of the Pacific Northwest, Congress passed Section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-21, 103 Stat. 701, and enacted it on October 23, 1989. Section 318, known as the "Northwest Timber Compromise" (Compromise), insured that the interests of both

[1] *See*, for example, *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988).

Pacific Northwest logging-dependent communities and the spotted owl were met. *See Portland Audubon Society v. Hodel*, 866 F.2d 302. However, acting in accordance with what has become an alarming trend in the Ninth Circuit, the court substituted itself as the policymaker for public lands and found the Compromise unconstitutional. Pacific Legal Foundation believes formulating public land policy is clearly the role of Congress and not the courts.

When courts make the ultimate determinations regarding environmental policy, due to the very nature of the adversarial system, one party inevitably wins and one party loses. With controversial issues such as the spotted owl, where the aims of both sides have merit, determinations of policy should be left to the Legislature.

> "Drafting, amending and enacting a bill can be a highly contentious affair that succeeds only because of compromises within the legislature. The final statute reflects the various states and intensities of legislative sentiment in the electorate. The legislation that results may be compared to a contract in which each side gives the other something in order to get some of what it wants. When [a court] distorts a statute, one side gets more than its bargain and the other gets less." Bork, *The Tempting of America* 102 (1990).

In enacting Section 318, Congress made an attempt to protect and advance the interests of all parties. The Compromise provided concurrently for the protection of the spotted owl and for the continuation of logging in national lands by allocating specific amounts of land to each activity. In order to ensure that the Compromise was

secure and land allocations would be carried out, Congress explained in Section 318 that the statutory requirements at issue in *Seattle Audubon Society v. Robertson* and *Portland Audubon Society v. Lujan* (*Lujan*), 884 F.2d 1233 (9th Cir. 1989), *cert. denied on other grounds*, ___ U.S. ___ (1990), were satisfied.

However, the Court of Appeals refused to read the Compromise as creating legitimate exemptions to certain environmental statutes. Rather, it held that Section 318 of the Compromise was an unconstitutional use of congressional authority. Instead of reading Section 318 in a constitutionally acceptable way, the Ninth Circuit interpreted Congress' language as usurping their constitutionally protected role and commanding the courts to decide *Robertson* and *Lujan* in a certain way.[2]

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[2] Section 318(b)(6)(A) which is the subsection concentrated on by the Ninth Circuit for its decision reads:

> "Without passing on the legal and factual adequacy of the Final Supplement to the Environmental Impact Statement for an Amendment to the Pacific Northwest Regional Guide—Spotted Owl Guidelines and the accompanying Record of Decision issued by the Forest Service on December 12, 1988 or the December 22, 1987 agreement between the Bureau of Land Management and the Oregon Department of Fish and Wildlife for management of the spotted owl, the Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the (continued)

The Ninth Circuit's holding in *Robertson* is faulty for a number of reasons. Not only did it misinterpret a number of controlling cases, but its decision is directly contrary to one of the most fundamental principles of statutory construction. In order to find that the Compromise was unconstitutional, the Court must have determined that there was no way to give the statute a constitutional interpretation. *Mistretta v. United States*, 488 U.S. 361, 384 (1989). Pacific Legal Foundation submits that the Act can be read easily in a manner that preserves its constitutionality.

ARGUMENT

I

SECTION 318 DID NOT DICTATE THE OUTCOME OF CASES, RATHER IT PROVIDED EXEMPTIONS TO NATIONAL ENVIRONMENTAL POLICIES; THEREFORE, CONGRESS DID NOT INTRUDE ON THE APPROPRIATE FUNCTIONS OF THE JUDICIARY

The underlying issue in this case would appear to be rather simple. Does Congress have the authority to

statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR. The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States."

manage the public lands? Of course the answer is yes. There is only one reason why this case is before the Court: the Ninth Circuit took umbrage with the "method" Congress used to exercise its management authority.

Congress, tired of a never ending series of lawsuits brought by environmental activists to stop timber harvesting in the Pacific Northwest, passed the Compromise. The purpose was to amend or repeal the application of a series of environmental planning laws to particular public lands so that timber sales on those lands would no longer be delayed by court action. Congress' authority to do this cannot be questioned. Even the Ninth Circuit acknowledged in the decision below: "Congress can *amend* or *repeal* any law, even for the purpose of ending pending litigation." *Seattle Audubon Society v. Robertson*, 914 F.2d at 1315 (emphasis in original, citations omitted).

But the court also ruled that Congress can alter the outcome of pending litigation only when " 'new circumstances have been created by legislation.' " *Robertson*, 914 F.2d at 1315 (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871)). The Court failed to find such "new circumstances" and instead ruled that Congress had violated the separation of powers tenet as interpreted by *Klein*.

In this section, Pacific Legal Foundation will show that the Ninth Circuit's invalidation of the Compromise, in principal reliance on *Klein*, is incorrect and based on strained analogies and logic. In actuality, the Compromise did indeed create new circumstances, and Section 318 amended or partially repealed the statutes at issue so they no longer applied to Compromise lands.

Amicus submits that *Klein* is being misapplied and that other precedents are more appropriate in light of the fact pattern of this case and the prior holdings of the Ninth Circuit.

A. Not Only Has Klein Been Misinterpreted by Respondents and the Ninth Circuit but Wheeling Bridge Is a More Appropriate Precedent to Follow

It is undisputed that Congress has the authority to manage and control activity on federal lands.[3] It is also clear that with the advent of environmental protection statutes, courts have become heavily involved not just in saying what the law is, but in interpreting and establishing federal environmental policy and land management requirements. Making such policy decisions is not a constitutionally envisioned role for the courts. Of course, in the absence of clear guidance from the Congress, it has been necessary to turn to the courts in order to understand environmental statutes. And, when there is no legislative or executive action, it may be appropriate for the courts to fill this void. However, when Congress seeks, as

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[3] *See Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905): "Congress is the body to which is given the power to determine the conditions upon which the public lands should be disposed of. . . . The nation is an owner, and has made Congress the principal agent to dispose of its property." Also, in *Light v. United States*, 220 U.S. 523, 536 (1911), the Court explained that Congress was free to administer national lands without interference from the courts.

it does now, to exercise its legitimate authority and provides clear direction as to its desired policy result, the courts must defer and relinquish any role they may have obtained due to Congress' inaction. The Ninth Circuit has declined to relinquish this control.

The Ninth Circuit and respondents rely heavily on *United States v. Klein*, 80 U.S. (13 Wall.) 128. An issue in *Klein* was whether an individual who had formerly aided the Confederacy had adequately evidenced loyalty for the United States to qualify under the law for return of confiscated property. The individual had received a presidential pardon after declaring loyalty under oath. By a post-pardon enactment, however, Congress instructed the courts that receipt of a pardon was to be construed only as an admission of past acts of disloyalty and could not be used as evidence of present loyalty.

In response, this Court held in *Klein* that Congress could not determine the evidentiary value of executive pardons as it would violate the principle of the separation of powers. The Court ruled that the legislation forced the courts to find a certain way in cases and seriously undermined the autonomy of the judiciary.[4] In the Court's words, it was "forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and [was] directed to give it an effect precisely contrary." *Klein*, 80 U.S. (13 Wall.) at 147. The legislation passed by Congress at issue in *Klein* was far

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[4] There was also an issue of interference with executive authority. The executive alone grants pardons, and the Court believed that the Legislature was now attempting to devalue this authority by limiting the meaning of the pardons.

reaching and would dictate the outcome of all cases involving the controversial pardons.

The facts in *Robertson* are much more similar to those in *Pennsylvania v. Wheeling Bridge and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), where the Court had declared a certain bridge to be a nuisance and Congress subsequently passed a law declaring that the structure was legal. The Court wrote:

> "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous Acts of Congress, they are to be regarded and modified in this subsequent legislation; and although it still may be an obstruction in fact, is not so in the contemplation of law." *Wheeling Bridge*, 59 U.S. (18 How.) at 430.

Likewise, the Compromise altered the legal status of the challenged policy and plans. Whereas there may have been doubt before as to whether or not they satisfied national environmental regulations, in light of Section 318 it was clear that they were now to be considered legally sufficient. The challenged congressional act in *Wheeling Bridge* was not directed at altering the Court's role in all future actions. Similarly, the Compromise simply provided that some Forest Service determinations for one fiscal year would be exempted from environmental regulations. As it did in *Wheeling Bridge*, Congress exercised its role and defined the legality of certain limited actions. Thus, under *Wheeling Bridge*, Congress' action was proper and constitutional.

In *Robertson*, however, the lower court places great stock on *Klein*. Yet, even within the Ninth Circuit other

panels have interpreted *Klein* in a different way. In *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987), the court reasoned that under *Klein* there would be an unconstitutional violation of the separation of powers principle only when "Congress . . . presumes to dictate 'how the court should decide an issue of fact (under threat of loss of jurisdiction)' and purports to 'bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.' " *Atmospheric*, 820 F.2d at 992 (quoting *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982)). Under this reading of *Klein*, even if Congress' actions are interpreted to require the court to make particular findings and are not an exemption or rewriting of previous legislation, Congress' actions are still constitutional unless the mandated findings are themselves constitutionally infirm. A congressional declaration of statutory sufficiency will not force the courts to make unconstitutional determinations.

In a stunning example of the legal contortions necessary to justify the holding in *Robertson*, the Ninth Circuit attempted to write off the two-prong test in *Atmospheric* as having been made disjunctive in *Grimesy v. Huff*, 876 F.2d 738 (9th Cir. 1989). *Robertson*, 914 F.2d at 1315. However, in actuality *Grimesy* upheld *Atmospheric*'s interpretation and used it to weaken the plaintiff's argument. The panel in *Grimesy* also noted that the plaintiff's position was further undermined by the newest edition of *Hart and Wechsler's The Federal Courts and the Federal System*. *Grimesy*, 876 F.2d at 745. The holding in *Grimesy*, despite what the *Robertson* court claims, goes even farther to support the holding in *Atmospheric* that two conditions

must be satisfied before Congress will be found to have violated the separation of powers.

Congress has the ultimate ability to author legislation and to manage federal lands. Therefore, to force a court to follow congressional determinations, even if it were an unwarranted order of mandatory fact finding, would not in and of itself result in manifestly unconstitutional decisions or orders. Thus, even under *Klein*, on which the Ninth Circuit relies most heavily, Section 318 is an appropriate and justifiable exercise of congressional ability.

B. The Same Court Which Decided Robertson Reached an Opposite Conclusion in Stop H-3 v. Dole, yet Stop H-3 Is the Better Reasoning and Should Have Been Followed Below

Confusion over the Ninth Circuit's reading of *Klein* and subsequent cases is heightened when *Stop H-3 Association v. Dole*, 870 F.2d 1419 (9th Cir. 1989), is considered. In an opinion decided by two of the same judges who wrote *Robertson*, the court upheld a congressional act which required the Secretary of Transportation to approve a construction project notwithstanding litigation challenging noncompliance with certain statutory environmental safeguards. There are few significant factual differences between this case and *Robertson* even though the same court reached opposite decisions. *Robertson* expressly asserted that actions directed and authorized by the Compromise were in compliance with the National Environmental Policy Act, the Migratory Bird Treaty Act, and the Federal Land Policy Management Act. This is no

different from *Stop H-3* where Congress excluded the project at issue from being subject to the regular environmental review considerations. In both cases, Congress specifically directed the respective actions to go forward and instructed that environmental laws which had been used and misused by opponents to stop governmental actions were no longer applicable to those actions.

Nevertheless, the Ninth Circuit held that Section 318 was unconstitutional, finding that it mandated certain factual findings. But Congress merely determined that, in light of Section 318, the statutory requirements for the cases pending were satisfied.

> "Congress, in enacting laws, may rest its policy decisions on 'factual' determinations, including determinations concerning the relationship of facts to preexisting law. Thus the . . . expression of its view that the H-3 project satisfied the requirements of the 4(f) statutes . . . does not represent 'adjudication' by Congress but rather the legitimate result of investigation and analysis upon which legislative decisions are based." *Stop H-3*, 870 F.2d at 1438.

In *Stop H-3* the Ninth Circuit also explained that the Legislature has the authority to overturn "judicial decisions which they feel are based on an interpretation of a statute . . . inconsistent with the intent of Congress when the law was passed." *Stop H-3*, 870 F.2d at 1429. It is only through the passage of new legislation that Congress can correct misinterpretations or distortions of previously passed laws. *See also Grimesy v. Huff*, 876 F.2d 738, where the Ninth Circuit allowed Congress to enact legislation correcting an agency's misinterpretation of a statute. In fact, the Ninth Circuit has determined that "we have

found no authority forbidding Congress in all instances from carving out a local exception to a national policy. To the contrary, many decisions approve of such action." *Stop H-3*, 870 F.2d at 1430. Unfortunately, in *Robertson* the Ninth Circuit forgot this principle and substituted its policy position for that of Congress.

C. The Implied Repeal Issue as Interpreted in Light of Tennessee Valley Authority v. Hill Does Not Apply to Section 318

The Ninth Circuit also tried to justify its finding of unconstitutionality by claiming that Section 318 could be read as an impermissible implied repeal. However, by following the principle of *Tennessee Valley Authority v. Hill* (*TVA*), 437 U.S. 153 (1978), such an interpretation should not be sustained.

In *TVA*, the Court refused to find an implied repeal of the Endangered Species Act (ESA) because the appropriations act in question did not explicitly refer to the ESA. The repeal could only be implied from the legislative history. There is no need to go to the legislative history of the Compromise to ascertain Congress' intent to effect a repeal. Here, the language of the Act makes the repeal crystal clear. The Act states in no ambiguous terms that the statutory requirements, which are the subject of the *Robertson* and *Lujan* controversies, have been met. Nevertheless, the Ninth Circuit held in *Portland Audubon Society v. Hodel*, 866 F.2d 302, that there could be "no express repeal without reference to the 'repealed' statute." *Id.* at 307. How presumptuous to claim that because Congress did not directly reference the statutes in question,

the obvious intent of the Legislature must be ignored. This is placing form over substance, diction over important public policy.

This Court need not resolve this question, however, as it is unnecessary, and probably inappropriate, to call the Compromise exemptions repeals. A repeal would have been necessary in *TVA* because the singular goal of the Endangered Species Act, to protect species from extinction at all costs, would have been thwarted. However, in *Robertson*, setting aside certain amounts of spotted owl habitat while opening up other land to timber management has satisfied the statutory goals of the legislation at issue. No *repeal* is needed; all that is being done is to create a time-specific, site-specific exemption from the express statutory requirements. Congress has presumed that after legislative debate and fact-finding, the purposes of that legislation have been adequately served.

Regardless of whether Section 318 is called an exemption, an exclusion, or a repeal, the intent of Congress should be respected and upheld. If the meaning and policy of Congress is clear, and the substance of what Congress has done is constitutional, the Court should not manufacture extremely literal readings of prior case law to avoid implementing policy it may find distasteful. In his *TVA* dissent, joined by Justice Powell, Justice Blackmun expressed similar fears: "With all due respect, I view this result as an extreme example of a literalist construction, not required by the language of the [Endangered Species] Act and adopted without regard to its manifest purpose." *TVA*, 437 U.S. at 202 (footnote omitted). If such an extreme literalist construction is avoided, the goals of the environmental regulations at issue in *Robertson* and *Lujan*

can be satisfied by the Compromise. The purpose of statutes such as the National Environmental Policy Act (NEPA) is to protect the environment by balancing conservation with other equally worthwhile goals. After lengthy debate in Congress, such a balance is necessarily present in the allocations of the Compromise.

D. The Ninth Circuit Abused Its Discretion by Finding That Section 318 Was Unconstitutional

Constitutional challenges are not to be considered lightly nor are constitutional violations to be easily found. Especially when passing on "an Act of Congress that confronts a deeply vexing national problem," a court should only find a provision unconstitutional for an extremely compelling reason. *Mistretta*, 488 U.S. at 384. "[F]ederal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and . . . when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988). While the Ninth Circuit may have sympathized with the Audubon Society or may have disagreed with Congress' delegations of land, the personal views of the judges are irrelevant. "A judge is also a voter, and it is in the polling booth that his moral views count." Bork, *The Tempting of America* at 125. The Ninth Circuit unfortunately lost sight of its role. While two lower courts were able to read this same act of Congress in ways that preserved its constitutionality, the Ninth Circuit stretched to do otherwise.

In *Mistretta*, this Court found that "petitioner's fears for the fundamental structural protections of the Constitution prove, at least in this case, to be 'more smoke than fire.' " *Mistretta*, 488 U.S. at 384. Similarly, Seattle Audubon Society's concerns for the integrity of the separation of powers principle are not well founded. The challenged congressional provision simply makes moot two pending cases. It does not permanently alter the structure of the federal system, nor does it establish a dangerous precedent as similar provisions will still be subject to the guidelines articulated in *Klein* and *Wheeling Bridge*.

What Congress' express determination of statutory adequacy attempts to do is protect its policy decision from meddling by the judiciary. Congress is using its power as a shield to protect its own integrity from further encroachments by the judiciary. The judiciary on the other hand, is using its power as a sword to carve out yet another role for judges to play in the formulation and implementation of policy. The Ninth Circuit is manipulating the Constitution to usurp Congress' function when historically "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function." *Panama Refining Company v. Ryan*, 293 U.S. 388, 421 (1935). To curb Congress' ability to moot these lawsuits would be to curb Congress' ability to insure that the laws it passes are followed and interpreted appropriately.[5]

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[5] The ability of Congress to change the law and to expect the new changes to be followed immediately is a (continued)

The Ninth Circuit should have exercised proper judicial restraint and should have shown some respect for congressional determinations. The Compromise is easily read as providing for case specific exemptions or exclusions to otherwise all-encompassing environmental legislation. To read it otherwise is to violate the clear principles of statutory construction laid out in *Mistretta*. More seriously, it advances the personality of the judiciary above the wishes of the people as articulated through Congress and it demeans the Constitution to nothing but a malleable document which can be interpreted in a myriad of ways to insure particular results.

II

IN THE ALTERNATIVE, EVEN IF CONGRESS HAS INTRUDED TO SOME DEGREE ON THE INTEGRITY OF THE JUDICIARY, THIS INTRUSION SHOULD BE BALANCED AGAINST THE GREATER HARM TO THE PRINCIPLE OF SEPARATION OF POWERS THAT WOULD OCCUR IF CONGRESS WERE NOT ABLE TO LIMIT JUDICIAL REVIEW

Assuming, for argument only, that it is possible to read Section 318 as constituting an intrusion on the rights and responsibilities of the judiciary, a constitutional violation still should not be found. Since the writing of the Constitution, there has never been any serious attempt to claim that the idea of the separation of powers was an

well-established tenet of American law. *See United States v. Schooner Peggy*, 5 U.S. (Cranch 1) 103, 109 (1801) (court must decide cases in accordance with the law existing at the time of the decision).

absolute system with clear limits and easily compartmentalized powers. In determining whether the Compromise violated the separation of powers, amicus submits that the Court should take a "pragmatic, flexible approach" in determining whether there was a separation of powers violation. *Nixon v. Administrator of General Services*, 433 U.S. 425, 442 (1977). In considering this issue, the Court should look at whether Section 318 will really have any long-term effect on the balance of power between these two branches.

Section 318 moots two cases. It does not attempt to bind the courts to similar findings in future cases. Nor does it say that the consolidated cases may not be maintained on other grounds. There will be no long-term alteration of judicial power. On the other hand, Section 318 insures that Congress will be allowed to carry out its constitutionally envisioned role of directing the management of the federal lands in a way most beneficial to the nation as a whole. Moreover, it is essential that Congress, not the courts, be allowed to shape federal land environmental policy. Only in the Legislature will representative accountability and thorough debate prompt decisions that reflect not only the will of the majority of the American people, but most importantly reflect a number of considerations including but not limited to environmental concerns.

A. Section 318 Merely Expands the Authority of Congress in Order To Allow It To Carry Out Its Constitutionally Authorized Function

"A considerable degree of congressional intervention . . . is constitutionally permissible if such intervention

is 'justified by an overriding need to promote objectives within the constitutional authority of Congress.' " *Brainer*, 691 F.2d at 698 (quoting *Nixon v. Administrator of General Services*, 433 U.S. at 443). As discussed above, the ability to regulate and manage national lands is clearly a congressional power. Furthermore, the overriding need for a coherent, legislatively formulated management plan for Pacific Northwest forest lands is apparent to all who have watched the shutdown of the lands to timber production and the resultant economic decline. These factors more than justify a minimal intrusion into the function and influence of the courts.

In other instances, Congress has gone as far, if not farther, to insure that its will is carried out. In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Supreme Court upheld a congressional action that reopened cases which had already received final determinations in the courts. Congress authorized de novo judicial review of the issues and precluded the defenses of res judicata and collateral estoppel. In *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, Congress enacted legislation that made the government the sole defendant in actions for wrongful death or personal injury resulting from nuclear weapons testing programs. Essentially, Congress removed private manufacturers from the scope of the court's jurisdiction. This congressional action was also upheld. In *Touby v. United States*, 500 U.S. ___, 114 L. Ed. 2d 219 (1991), the Court upheld a congressional amendment to the Controlled Substances Act which allows the Attorney General to temporarily list drugs as controlled without having to comply immediately with the Administrative Procedure

Act. The Court recognized the importance of quick action in order to combat the scourge of designer drugs and also upheld the provision of the amendment that allowed for no judicial review of the temporary listings. While congressional acts are always subject to the review of their constitutionality, courts have wisely deferred certain powers to the Congress in matters that are of immediate national importance.

This deferral makes sense if the functions of judicial review are understood. Judicial review does not

> "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather then the former." *The Federalist No. 78* at 467-68 (A. Hamilton) (C. Rossiter ed. 1961).

It took a great deal of circuitous logic, explanations, and rewriting of case law for the Ninth Circuit to come up with a finding of unconstitutionality. This finding thwarts the very will of the people that the courts are supposed to protect.

The purpose of the judiciary is not to determine whether the Legislature acted appropriately. As the Supreme Court noted in *Tennessee Valley Authority v. Hill*:

> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of

> review, nor are we vested with the power of veto. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and public weal.' " *TVA*, 437 U.S. at 194-95.

Thus, apart from a finding of clear unconstitutionality, the courts have no further involvement with congressional enactments. Recognizing the inherent limits on judicial control over congressional enactments, Section 318 represents a most minimal intrusion on the judicial role.

B. The Judiciary's Intrusion on Congress' Land Management Abilities Is a Serious Violation of the Separation of Powers Doctrine and It Was Congress' Clear Intent That This Intrusion Be Avoided

Inherent in the idea of the separation of powers is the notion of the autonomy of the branches. Even in the Federalist papers though, the distinction between autonomy and insularity was recognized. Madison, in interpreting Montesquieu wrote:

> "[He] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. . . . His meaning . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." *The Federalist No. 47*, at 302-03 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original).

If the courts are allowed to invalidate appropriations measures, the courts are given the power of Congress. If the courts are allowed to determine what are appropriate uses of federal lands, the courts are given the power of Congress. If the courts are allowed to shape national environmental and economic policy by preventing logging and encouraging "at all costs" environmentalism, the courts are given the power of Congress.

Prior to the Compromise, Congress' ability to manage national lands was significantly undermined by judicial interference. The Court has the power to review acts of Congress for constitutionality. However, this grant of power was not intended to allow the federal courts to override congressional enactments by a mere mention of "unconstitutionality" absent a finding of a substantive constitutional violation. *See Mistretta* and *Beck, supra.*

The founding fathers envisioned a very limited role for the judiciary.[6] Certainly the federal courts were never supposed to author national policy. Finding constitutional infirmities in order to advance certain political or personal goals not only undermines the integrity and the appropriate function of the judiciary, but it forms poor

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[6] "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may be truly said to have neither FORCE nor WILL but merely judgment. . . . [I]t can never attack with success either of the other two." *Federalist No. 78* at 465 (A. Hamilton).

precedent and disreputable case law. "[C]ourts must choose principles which they are willing to apply neutrally, apply, that is, to all cases that may fairly be said to fall within them. This is a safeguard against political judging." Bork, *The Tempting of America* at 146 (footnotes omitted). When comparing *Robertson* to other Ninth Circuit decisions, especially *Stop H-3*, it is hard to understand their differences on the substantive issues of law. This leads even the most charitable observer to conclude that the decisions in the cases differ not because of the legal issues involved but because of the results sought in each.

The Compromise represents Congress' frustration with judicial impediments to agency decisions. It also represents an attempt to deal on a national level with a divisive and disruptive issue, an issue that involves huge expanses of land and tens of thousands of jobs. Congress is interfering with judicial prerogative, if at all, in the most limited way and only to allow it to accomplish tasks set for it by the Constitution.

> " 'All the public lands of the nation are held in trust for the people of the whole country.' And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside land for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose." *Light v. United States*, 220 U.S. at 537 (citations omitted).

When the courts go beyond statutory interpretation and begin to create land management and environmental protection duties, they are managing the public trust in a way that was never envisioned by the founding fathers or by the holdings of this Court.

It may be that Congress has stepped on the toes of the judiciary. Or, it may be that Congress is simply drawing a proverbial line in the sand. Tired of judicial intervention, Congress is beginning to establish limits beyond which judicial activists are not allowed. Even if this is true, the fact still remains that the principle of separation of powers is not a concept with crystalline demarcations of acceptable or unacceptable intrusions. As is necessary so often in the law, equitable approximations must be made and, in this case, the balance falls on the side of Congress. Regardless of whether Congress overstepped its bounds, if the judiciary is allowed to control the management of national lands, as it has been attempting to do, the separation of powers ideal will be more greatly tarnished and more permanently undermined.

CONCLUSION

There is more at issue in this case than simply the enhanced protection of a threatened species. Also at issue is the economic and social stability of a region, the jobs of thousands, and now, the issue of the appropriate capacity of the judiciary. Congress has attempted to resolve the first issues fairly and sanely. However, the Ninth Circuit has placed its own policy resolves ahead of the long-term stability and effectiveness that a congressionally enacted

plan offers. It is up to this Court to determine what the appropriate role of the judiciary is. Amicus submits that courts exist not to create policy but to implement it; not to rewrite the will of the Legislature, but to insure that it is complied with. To allow the Ninth Circuit to so brazenly scorn not only legislative intent but the critical and sensitive nature of the issue at hand is to allow the federalist system to be hopelessly undermined.

Congress should be allowed to manage the federal lands without judicial intervention. This may mean that Congress will carve out exemptions to environmental policy from time to time. No one seriously doubts that Congress has this ability and the courts should not be permitted to use strained and stretched logic to find otherwise. Federal courts should not be allowed to use tenuous claims of unconstitutionality to undermine legitimate attempts by Congress to resolve issues of national importance. The constitutionality of congressional enactments should be preserved whenever possible. As demonstrated above, amicus submits that this Court has ample grounds to rule the Northwest Timber Compromise is a constitutional congressional enactment.

For the above reasons, Section 318 of the Northwest Timber Compromise should be upheld and the decision below reversed.

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Respectfully submitted,

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae
Pacific Legal Foundation